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DEC 18 1978

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*, *Petitioners*,

COLUMBIA BROADCASTING SYSTEM, INC., *Respondent*.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, *Petitioners*,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF NATIONAL RELIGIOUS BROADCASTERS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

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Pursuant to Rule 42(3) of the Rules of this Court, National Religious Broadcasters, Inc. (NRB) moves for leave to file a brief *amicus curiae* in the above-entitled consolidated cases. Counsel for the Respondent in both of the above-entitled

cases has consented to the filing of the attached brief.* Counsel for Petitioners have not.

Interest of *Amicus Curiae*

NRB is a non-profit tax-exempt corporation composed of approximately 850 organizational members who own and operate television and radio stations in all 50 states, the District of Columbia, Puerto Rico and Guam and/or produce programs for broadcast and cablecast. It was formed in 1944 in order to contribute to the improvement of religious broadcasting so that it better serve the public interest and more effectively minister to the spiritual welfare of the nation.

Virtually every radio and television licensee member of NRB faces the problem that Respondent has with Petitioners and which is the subject of this proceeding. Notwithstanding that NRB's members perform largely or only gospel, sacred and inspirational music on their broadcast stations, in order to ensure freedom from infringement of copyright suits they must purchase from Petitioners blanket licenses to perform the entire repertory of each. The price exacted is fixed by Petitioners and their affiliates and members in the same way as Respondent here complains is in violation of Section I of the Sherman Act.

The present case raises several issues, the resolution of which NRB believes it is so situated as to be of substantial assistance to the Court. By and large NRB represents small stations whereas Respondent is the giant of the industry. Nevertheless their interests are parallel. Moreover, since this Court will be asked to rule for the first time as to whether a "market functioning" exception exists as to the *per se* illegality of price-fixing, NRB demonstrates in its Brief that once the price-fixing schemes complained of herein are

*The letter of consent has been lodged with the Clerk of the Court.

broken up, at least so much of the market as concerns NRB stations will function quite readily.

We believe it will be particularly helpful to the Court to have the views of the smaller members of the broadcast industry.

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BRIEF FOR NATIONAL RELIGIOUS BROADCASTERS, INC. AS *AMICUS CURIAE*

National Religious Broadcasters, Inc. (NRB) as *Amicus Curiae*, urges the Court to affirm the judgment of the United States Court of Appeals for the Second Circuit for the reasons set forth in this Brief.

Interest of Amicus Curiae

The interest of Amicus Curiae is stated in the Motion for Leave to File, *ante*.

Questions Presented

1. Whether it is illegal *per se* under Section I of the Sherman Act for copyright holders of non-dramatic performance rights in musical compositions — who would otherwise compete with one another — to universally agree to have a sales committee market their products at a price formula fixed by that committee?

2. Whether the market in non-dramatic performance rights of musical compositions will function when price-fixing is removed therefrom?

3. Whether there is such a thing as a "market functioning" exception to the rule that price-fixing is illegal *per se*?

4. Whether the Court of Appeals has directed the District Court to fashion a remedy that is reviewable, much less illegal?

Statement of the Case

Columbia Broadcasting System, Inc. (CBS) filed this anti-trust action against the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI)

and certain of their members and affiliates (as a class), which members and affiliates are writers and publishers of musical compositions. In order to perform any copyrighted musical composition, the user—such as the CBS Television Network, individual television and radio stations, and concert promoters—must obtain the non-dramatic performance rights in the compositions to be performed. ASCAP is an unincorporated association of creators and publishers of music whose members have granted to it the non-exclusive right to license the public performance of their compositions. BMI is a corporation which was organized for the same purpose.

ASCAP and BMI only issue blanket licenses, meaning that the user can only buy from ASCAP and BMI the right to perform all of the compositions in their respective repertories. Thus, if CBS were to purchase from ASCAP the right to perform the music from Mass by Leonard Bernstein, it would also be required to purchase the rights to performance of, among others, every acid rock, country, and rhythm and blues composition that ASCAP is authorized to license. The same is true of BMI. The only choice a user has when dealing with ASCAP or BMI is whether to buy the rights to their entire repertories for unlimited performance any or all of the time during the license period or whether to buy their entire repertories for use only on specific programs. In neither event is the price negotiable, it having already been fixed by formula by ASCAP and BMI.[1] For these rights, the user, here CBS, pays a fixed percentage of its income regardless of the number of uses it makes of copyrighted works. Moreover, while the individual members and affiliates of ASCAP and BMI retain the right to license their works independent of

1. As to ASCAP alone, if price is disputed, the user can apply to the United States District Court for the Southern District of New York in order that the court fix the price. But that has never happened. (Pet. A. 18a n. 23, 30a-31a).

ASCAP and BMI, were that to happen the user would receive from ASCAP and BMI no reduction in the fee payable for the unlimited blanket license. (Pet. A. 6a-7a). So, too, it is under a per-program blanket license, where, even worse," [i]t does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same." (Pet. A. 7a n.9).

ASCAP and BMI take considerable pride in controlling the music market with ASCAP noting in its brief that it "today has 16,000 writer and 6,000 publisher members..." and "licenses also on behalf of the hundreds of thousands of members of some 30 affiliated foreign societies." ASCAP Br. at 6-7. Similarly, BMI lays claim to "more than 33,000 composers and authors of music and more than 16,000 music publishing companies permitting BMI to offer licenses to perform their works." BMI Br. at 3. While it is true that ASCAP and BMI speak on behalf of thousands of writers and composers, all of whom have delegated to ASCAP or BMI the right to determine pricing, it is also true that a direct negotiation market with individual copyright owners is practical, as both the District Court and the Court of Appeals determined, (Pet. A. 8a-9a), at least if fixed prices are removed as an obstacle.

The District Court regarded the case as principally a tie-in or block-booking one which required proof of coercion in order for illegality to be established. Because direct licensing is available, the scheme, it found, was not coercive and therefore not illegal. (Pet. A. 8a). It also concluded that there was no unlawful price-fixing inasmuch as the copyright owners retained their right to deal directly at "negotiated price[s] for each license" (absent a showing that the copyright owners forced the users to accept the ASCAP or BMI fixed price.) (Pet. A. 114a-115a). On the issue of price-fixing the Second Circuit reversed, also finding copyright misuse. (Pet. A. 21a and 23a n.29).

Summary of Argument

In order to perform any copyrighted musical composition, the user — such as the CBS Television Network, individual television and radio stations, and concert promoters — must obtain the non-dramatic performance rights in the compositions to be performed. The writers and composers of these works (often through their publishers) sign away to ASCAP and BMI the right to license their works *and to set the prices therefor*. After this is done a small group of individuals at ASCAP and BMI fix upon a percentage of gross income which they then demand of all networks and broadcast stations that wish to play any music which appears in the ASCAP or BMI repertory. Since most music does appear in one of the two repertories, both licenses are compulsory in order to avoid copyright infringements. In the normal market situation, these authors and composers would compete with one another as to price and exposure on the television networks and throughout the broadcast industry. However, they have here accepted the invitation to participate in a plan the necessary consequence of which is the fixing of prices for the performance of their works.

Price-fixing is illegal *per se* as set forth by this Court in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940). That the plans call for prices to be fixed by various formulae so that they are not uniform and inflexible does not save them from constituting price-fixing. The price-fixing would have had a very significant influence on the prices that might have been obtained had CBS negotiated directly with the composers, authors or publishers holding the copyrights — which theoretically CBS legally could have done. Since the price-fixing has "clearly curtailed" competition it falls within the evils of *Socony-Vacuum*.

If price-fixing is eliminated, the evidence suggests there is every reason to believe that the market will function quite well. Agencies which presently handle the marketing of other rights arising under copyrights of musical works could

expand their operations into the marketing of performance rights; handling them, too, in legal and legitimate ways. Alternatively, absent being locked out of the market, marketing entities for performance rights similar to advertising agencies would enter the field. Not only was the Second Circuit's apparent fear of disrupting the broadcast and music performance rights industries unfounded, its creation of a "market functioning" exception to the *per se* rule against price-fixing has no support in the law and should be put to rest.

Finally the Court of Appeals has not directed the District Court to fashion a remedy that is now reviewable, much less illegal. As a practical matter if price-fixing is eliminated from the market, the blanket license as it is presently known could not continue to exist. But that is not to say that a full line of compositions, i.e., a blanket license, could not be fashioned for those who wish to purchase it, and in such a way as does not involve a conspiracy to fix prices.

ARGUMENT

I

Blanket Licenses as Presently Offered by ASCAP and BMI are Price-Fixing and are *Per Se* Illegal

The blanket licensing scheme engaged in by ASCAP, BMI and their members and affiliates is perhaps the most pervasive example of price-fixing ever to confront this Court. To be sure, the record in this case only covers price-fixing as to CBS. But the entire industry is subject to the same abuses that confront CBS.

The fact of the matter is thousands of writers and composers (often through their publishers) sign away to ASCAP and BMI the right to license their works *and to set the prices therefor*, whereupon a small group of individuals at

ASCAP and BMI fix upon a percentage of gross income which they then demand of all networks and broadcast stations that wish to play any music (including that in commercials) which appears in the ASCAP or BMI repertories. Since most music does appear in one of the two repertories, *both* licenses are compulsory in order to avoid copyright infringement suits. (Pet. A. 22a, 27a). ASCAP and BMI are not distributorships or common sales agencies, they are devices whereby competitors abdicate to a small band of people all pricing responsibility, which band then comes up with one price formula for all of the works of all of its members or affiliates.

Section 1 of the Sherman Act[2] provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among these several States, or with foreign nations, is declared to be illegal...." ASCAP advances the novel theory that because its members do not assemble to conduct the price-fixing, they do not fix prices. ASCAP Br. at 26. That argument is simplistic and finds no support in the history of antitrust law. This Court held in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939):

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schneck* v. *United States*, 253 F. 212, 213, *aff'd.*, 249 U.S. 47; *Levey* v. *United States*, 92 F. 2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Ass'n* v. *United States*, 234 U.S. 600; *Lawlor* v. *Loewe*, 235 U.S. 522, 534; *American Column Co.* v. *United States*, 257 U.S. 377; *United States* v. *American Linseed Oil Co.*, 262 U.S. 371.

306 U.S. at 227.

2. 15 U.S.C. § 1.

It is the participation by ASCAP's and BMI's members and affiliates — who would otherwise compete with one another as to price and exposure — in the plan restraining interstate commerce that constitutes the illegal combination complained of in this action. It is not necessary that a convocation be held at which each member or affiliate votes on a proposed price or method of distribution of proceeds. *Id.*

ASCAP's definition of price-fixing, reading out utilization of a formula with which to fix prices, is similarly without support in the antitrust law. That issue was addressed by this Court in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940) where the fact that the prices that a combination paid "were not fixed in the sense that they were uniform and inflexible" was characterized as unimportant. *Id.* at 222.

> An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.
>
> * * *
>
> Hence prices are fixed within the meaning of the *Trenton Potteries* [273 U.S. 392 (1927)] case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, *or if by various formulae* they are related to the market prices. They are fixed because they are agreed upon. *Id.* (Emphasis supplied).

There is here no question about how ASCAP and BMI operate. A formula is devised to determine how much CBS (and every other performance licensee) owes each licensing organization. Thus, ASCAP's argument that its members do

not engage in conduct "the purpose and necessary effect of which is to fix and maintain prices" (ASCAP Br. at 26) is completely without merit. Both necessary determinants to price-fixing by ASCAP, BMI and their members and affiliates are here present: (1) otherwise competing creators have agreed upon a plan (2) which fixes a uniform formula that exacts a price from CBS and every other music user. Thus we have price-fixing and its recognition by the Second Circuit was clearly correct.

BMI has framed the issues in a way that is legally irrelevant to this case. It takes a starting point the fact that a television network, including CBS, wishing to perform any musical selection in the repertory of BMI could obtain a performance license from the individual copyright owner, bypassing BMI, and then asks, in the light of the foregoing, whether the offering by BMI of an alternative in the form of a blanket license is *per se* unlawful price-fixing. BMI Br. at 3. As framed, for BMI's issue to be answered affirmatively, it would depend upon the failure of the bypassing. While industry-wide, BMI's offer of blanket licenses is eminently successful, it makes no difference that the television networks might be able to deal directly with copyright owners. As was said in *Internatioanl Salt Co., Inc.* v. *United States*, 332 U. S. 392 (1947): "under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemming the direction of the movement." *Id.* at 396.

Nor is it important that the blanket license scheme is not the only method by which the television networks could do business. This Court's teaching in *Socony-Vacuum* is instructive:

> the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is indisputable that that competition was restricted through the removal by

> respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets.
>
> * * *
>
> Competition was not eliminated from the market; but it was clearly curtailed...." 310 U.S. at 220.

The mere fact that there may exist a way around the price-fixing machinery simply has no bearing on the issue of whether that machinery is price-fixing. As was the case in *National Society of Professional Engineers* v. *United States*, _____ *U. S.* _____, 55 L. Ed. 2d 637, 644 (1978) "the asserted defense rests on a fundamental misunderstanding ..." of the law. Whether there are one, two or three alternatives to dealing with price-fixers does not make them any the less price-fixers for "the test is not what the actual effect is on prices, but whether such agreements interfere with 'the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 132 (9th Cir. 1960).[3] Even if asked to negotiate directly, the copyright owners' price quotations would be influenced by the prices they receive pursuant to their concert of action in blanket situations, (Pet. A. 11a-12a), thus falling within *Plymouth Dealers' Ass'n.*

ASCAP also misses the point by attempting to inject the rule of reason, common sales agencies, coercion or lack thereof and vertical restraints into its defense. As the 9th Circuit recognized in *Plymouth Dealers Ass'n, supra*, that while there sometimes exists a question as to whether certain acts do or do not constitute *per se* violations, there is never any question "but that fixing prices is one of the three most readily recognized and generally acknowledged *per se*

3. Quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951)

violations..." 279 F. 2d at 131. Once it may be determined that an agreement to fix prices has come into being "it is conclusively presumed that a conspiracy to restrain trade exists...."*Id.* In *Professional Engineers, supra,* this Court reiterated in April, 1978 the *Socony-Vacuum* thesis that the "central nervous system of the economy" is price and that "an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." 55 L. Ed. 2d at 650.

Amicus agrees with ASCAP that a proper statement of the law is that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive." ASCAP Br. at 26, quoting *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 344 U.S. 36, 49-50 (1977). But *Continental TV* involved vertical restraints, not price-fixing. Nor are the common sales agency cases apposite. Of the cases ASCAP cites in support of its common sales agency theory, none involved anything like the ASCAP or BMI plans. In *Appalachian Coals, Inc. v. United States,* 288 U.S. 344 (1933), there was confronted a "plan [that] cannot be said either to contemplate or to involve the fixing of market prices." *Id.* at 373. In *Associated Press* v. *United States,* 326 U.S. 1 (1945) there was involved a concerted refusal to deal, not a price-fixing agreement, whereby certain "publishers have, by concerted arrangements, pooled their power to acquire, to purchase, and to dispose of news reports through the channels of commerce." *Id.* at 16. In *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231 (1918) the commodity exchange adopted a rule which was a "restriction ... upon the period of price-making," *id.* at 239, and "had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago." *Id.* at 240.

Similarly unavailing are the *Hazeltine* cases, for neither involved price-fixing. In *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) there was involved a contractual relationship between two parties only. Petitioner tried and failed to establish an antitrust theory

under this Court's tie-in cases but "the question[] for determination [is] whether a misuse of patents has been shown," *id.* at 830[4] where Automatic Radio contracted to use any or all of Hazeltine Research's patents in the manufacture of its products and for which Automatic Radio agreed to pay Hazeltine Research a percentage of the former's selling price of each radio receiver or $10,000 per year, whichever was greater. *Automatic Radio* is no different from a situation where one composer might authorize CBS to acquire the performance rights to his musical selections only if CBS would buy the rights to them all. But that is not what this case is about. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) there were charges that Hazeltine and its parent corporation had "conspired with the foreign patent pools to exclude Zenith from the Canadian, English and Australian markets." *Id.* at 105. It was also charged that Hazeltine had misused its United States patents "by attempting to coerce Zenith's acceptance of a 5-year package license, and by insisting on extracting royalties from unpatented products. *Id.* In no way, shape or form did *Zenith Radio* involve price-fixing.

Obviously, not every conspiracy in restraint of trade is a conspiracy to fix prices. But the ASCAP and BMI plans are, and they are *per se* illegal. The rule of reason simply has no applicability.

II

The Market Will Function Quite Well if Allowed to Operate Without Restraint; In any Event There is no Such Thing As a "Market Functioning" Exception to the *Per se* Rule

By virtue of the Copyright Act a copyright issued to a composer invests in him the right to determine if and how his

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4. The other question, not here relevant, was whether patent validity could be used as a defense to avoid payment of royalties under an agreement. *Id.*

work will be produced, distributed, performed, displayed or used as a source for derivative works.[5] Of those, the only right subject to a price-fixing scheme is the performance right. All of the other rights arising under a copyright are marketed in legal and legitimate ways and there is no reason why the performance rights cannot be handled the same way. Moreover, there is no reason to suspect that ASCAP and BMI could not, if they so chose, continue to operate in the licensing of performance rights without engaging in price-fixing. The Second Circuit's decision does not in any way foreshadow the doom of ASCAP or BMI — but is going to make them reform.

At trial, a great deal of evidence was adduced as to whether the market would function if CBS bypassed ASCAP and BMI. The District Court concluded it would (Pet. A. 112a) and this finding was left undisturbed by the Second Circuit. (Pet. A. 10a). No one expects CBS to start contacting thousands of individual writers and composers. As a practical matter, the television synchronization rights (meaning the right to put, or synchronize, music onto video tape for television purposes) are already handled by an independent agency in Los Angeles, California. If price-fixing were eliminated it would be easy enough to purchase the performance rights at the same time that synchronization rights are purchased. (Pet. A. 67a-68a, 72a-76a). That agency neither fixes prices nor requires a buyer to buy all the synchronization rights of the writers and composers it handles. Moreover, the evidence firmly establishes that publishing houses are eager to have their works performed and would line up at CBS's door. (Pet. A. 112a). As the Court of Appeals correctly noted "[t]he upshot is that, as a practical matter, the networks would generally deal with publishers or through brokers or agencies of the publisher, rather than composers." (Pet. A. 10a).

There is no reason to believe in either radio or television

5. 1 Nimmer, Copyright, Sections 100-108 (1976).

that market machinery similar to that for advertising[6] will not immediately spring up once ASCAP's and BMI's price-fixing schemes are finally declared illegal — and ASCAP and BMI will be in an excellent position to transform themselves rather than allow the field to go to competitors. In any event, producers of goods and services deal with advertising agencies who in turn deal with radio and television stations across the country. In dealing with an advertising agency, a middle man, no price-fixing is involved, and need not be in performance rights licensing.

In the field of gospel and sacred music, if ASCAP and BMI fail to set up the machinery to license the performance rights of the authors and composers of that type of music, there are innumerable record and music publishing companies ready to pick up the mantle. For those stations that wish blanket licenses in order to be able to play any and all kinds of music without worrying about possible infringement, there is nothing in the Second Circuit's opinion foreclosing that. ASCAP and BMI could still offer blanket licenses, they just could not do it by means of first fixing prices.

Apparently of the belief that its ruling would disrupt the entire broadcast and performance licensing industries, the Second Circuit proceeded to create a "market functioning" exception to the *per se* rule against price-fixing. It relied on the Ninth Circuit's decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (9th Cir. 1967), cert. denied, 389 U. S. 1045 (1968) and in particular, on the Solicitor General's brief amicus curiae in support of certiorari. However, *K-91* involved a copyright infringement action brought by several ASCAP members against a single radio broadcaster where it was recognized by the parties that for a single radio station "there was a market need for blanket licensing" and where it had been stipulated that "[i]t would be commercially,

6. Of course placement of advertising is different from performance rights licensing in that the money flows in the opposite direction.

practically and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations." (Pet. A 14a). It may very well be true, and probably is, that no one broadcaster, in radio or television, could go outside the present licensing system and expect to be successful. But that is simply not the way it would happen, as we have seen. Once an entrepreneur can envision that he will not be locked out of a market by an illegal price-fixing scheme, common sense dictates he will enter that market and provide the absent services.

In any event, it was wholly improper for the Second Circuit to reach for a stipulation in another case involving wholly different circumstances and theories of law in order to create a rule of law. In creating the market functioning exception, the Second Circuit purported to rely upon four cases, three of which[7] were decided before the seminal case of *Socony-Vacuum* and the fourth of which[8] involved only a concerted refusal to deal and, moreover, does not begin to support creation of a market functioning exception.

In *Appalachian Coals* there was involved price-fixing by a limited segment of coal producers in Appalachia but as noted *supra*, the fixing of market prices was impossible and was not contemplated under the plan. 288 U.S. at 373. That is hardly the case with ASCAP and BMI. In a well-reasoned Note in the *Yale Law Journal* commenting on the Second Circuit's decision in this case, it is pointed out that "[t]he modern rule against price fixing, however, is a direct repudiation of the reasoning of *Appalachian Coals*. The linchpin of *Socony-Vacuum* is the statement that whatever the economic

7. United States v. St. Louis Terminal, 224 U.S. 383 (1912); Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

8. Associated Press v. United States, 326 U.S. 1 (1945).

justification for particular agreements, the law does not permit an inquiry into their reasonableness." 87 Yale L.J. 783, 799 (1978). Amicus agrees and submits that there is no such thing as a market functioning exception to the rule that price-fixing is *per se* illegal.

III

The Court of Appeals has not Directed the District Court to Fashion a Remedy that is Reviewable, much less Illegal

Unquestionably, under the present market structure "the very availability of the blanket license itself involves the fixing of a collective price ..." (Pet. A. 20a) which is price-fixing. Merely because price-fixing and the blanket license are presently synonymous does not mean that they must remain so for all time. When a magazine distributor offers a full line of publications he has not, by that fact alone, conspired with his publishers (nor have they conspired among themselves) to fix prices.

Inasmuch as no remedy has yet been fashioned, there is nothing for this Court to review. The Court certainly should not assume that the District Court will fashion a remedy that continues to countenance price-fixing. In essence, that would be the reverse of what the Second Circuit directed. (Pet. A. 21a).

CONCLUSION

For the foregoing reasons, the judgment entered below by the United States Court of Appeals for the Second Circuit should be affirmed.

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